SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 397

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit, rendered on July 30, 1943, has not been officially reported, but it appears at Tr. 111-119. The dissenting opinion of Circuit Justice Waller appears at Tr. 119-130.

II.

Jurisdiction.

1. The petition for writ of certiorari is applied for under Judicial Code, Section 240 as amended February 13, 1925,

c. 229, Sec. 1, 43 Stats. 938, January 31, 1928, c. 14, Sec. 1, 45 Stats. 54, and June 7, 1934, c. 426, 48 Stats. 926 (now Section 347), providing in substance that any case, civil or criminal, in the Circuit Court of Appeals shall be competent for the Supreme Court to require by certiorari, either before or after the judgment, that the cause be certified to the Supreme Court.

2. The Circuit Court's decision was rendered July 30, 1943. (Tr. 111-130) Petition for rehearing was timely filed August 19, 1943. (Tr. 131-148) The petition for rehearing was denied September 1, 1943. (Tr. 149)

3. The trial court sustained all demurrers. (Tr. 92) The Government appealed to the Circuit Court of Appeals for the Fifth Circuit, and that court on July 30, 1943, held that the trial court correctly sustained the demurrer of Business Organization, Inc., and erroneously sustained the demurrer of petitioners and reversed and remanded the case for further proceedings in accordance with its opinion. (Tr. 111-119)

4. The cases sustaining jurisdiction are as follows: *American Construction Co.* v. *Jacksonville*, etc., 148 U. S. 372; *Forsyth* v. *Hammond*, 166 U. S. 506; *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; *Gay* v. *Ruff*, 292 U. S. 95; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Anderson Mfg. Co.* v. *Davis, Collector of Internal Revenue*, 301 U. S. 337.

III.

Statement of the Case.

The summary of the matter involved in the petition contains a statement of the case except that references to the provisions of the indictment do not give a full outline of the indictment. A concise statement of the substance of the

allegations of the indictment pertinent to the questions herein raised follows:

The Indictment.

COUNT ONE

The following are defined as retail food stores in local areas:

(1) "Chains" or "food chains" are groups of four or more retail stores under single management; some of these engage in shipping, canning, packing, processing, manufacturing, brokering and wholesaling. (Tr. 7-8); (2) "combination stores" primarily sell same merchandise as grocery stores, with fresh meats; (3) "grocery stores"; (4) "independents" operating one to three retail stores (Tr. 8); (8) "self-service stores" where customers select and carry away merchandise; (9) "service stores" with clerks and deliveries (Tr. 9); (10) "supermarkets", self-service stores in thickly settled centers (Tr. 10).

The other businesses involved in the indictment are defined as follows:

(5) "Manufacturers," "canners," "processors," and "packers," who operate no retail outlets, pack, can or process food products. (Tr. 9)

(11) "Wholesalers" maintain warehouses for storage and distribution to retail stores operated by others. (Tr. 10)

The Defendants.

The defendants are (1) twelve corporations indicted as the A & P Group, each a non-resident of Texas, with general offices in New York (Tr. 10-11); (2) eight individual defendants, general officers of the A & P Group, are indicted as headquarters defendants, all residents of New

York except one, a resident of New Jersey (Tr. 11-14); (3) eight individual defendants, officers and employes of the A & P Group—five are presidents of A & P Divisions, one Agent in Charge of National Meat Department, one Agent in Charge Buying Office, and one superintendent of the Dallas unit, all non-residents of Texas except the last named; (4) Business Organization, Inc., incorporated in and with its principal office in New York, and its chairman of the board, Carl Byoir, are indicted as public relations counsel of the A & P Group. (Tr. 14-15)

Nature of Trade and Commerce Involved.

The food industry consists of activities of producing, preparing for consumption, and moving food products to consumers. The food distributing agencies are in effect a conduit through which food products continually flow in interstate commerce from points of production in one or more states to consumers in other states (Tr. 15-16).

In 1939 there were 10,945 wholesalers of consumer goods, 2,592 manufacturers sales branches, over 560,000 retail stores, most of which do not engage in any other branch of the industry. (Tr. 16) There were 387,337 grocery stores and combination stores, including supermarkets. Independents own 89.92% of the grocery stores and 89.14% of the combination stores in the country. The balance of the grocery stores and combination stores are owned by chains. (Tr. 16-17).

The New York Great Atlantic & Pacific Tea Company, a New York corporation, and the Great Atlantic & Pacific Tea Company, a Maryland corporation, are holding corporations owning the stock of one or another of the defendant corporations. The Maryland corporation owns all of the stock of the other A & P corporations except the Great Atlantic & Pacific Tea Company of Vermont, which is owned

by the Great Atlantic & Pacific Tea Company of New Jersey. (Tr. 17-18).

The A & P Group are the largest purchasers, manufacturers, processors, wholesalers and retail distributors of food products in the United States. They also manufacture, process, can, pack, wholesale and engage in the brokerage business through subsidiaries. (Tr. 18)

The subsidiaries, viz.—

(a) The Tea Company of Vermont operates retail liquor stores in Vermont.

(b) Quaker Maid operates food manufacturing plants in New York and Indiana. The products of these plants are distributed through the wholesale warehouses and retail stores of the Tea Companies of New Jersey, Arizona and Nevada, and are also sold to others. (Tr. 18-19).

(c) American Coffee Corporation maintains organizations in coffee producing countries. Green coffee is purchased from the growers and on the spot market, transported to export points, transferred to the Great Atlantic & Pacific Tea Company, and imported by it to the United States. There it is stored in A & P coffee warehouses until needed and then shipped to roasting plants, blended, roasted, packaged, shipped and distributed through the wholesale warehouses and retail stores of that company of New York, New Jersey, Arizona and Nevada.

(d) White House Milk Company purchases milk near its plants in Wisconsin and there dehydrates, cans and labels it. It is then distributed through A & P wholesale warehouses and retail stores and is sold to others. (Tr. 20).

(e) Nakat Packing Corporation operates fishing grounds off of Alaska and the Pacific Northwest, where salmon is packed and canned and then distributed through A & P warehouses and retail stores. (Tr. 20-21).

(f) The Atlantic Commission Company purchases fruits and vegetables for A & P retail stores, which it sorts, grades, packs and stores at its packing plants. 75% of these are sold in retail stores, 25% to the independent jobbing trade. That company engages in the brokerage business for growers and acts as buying broker for dealers. (Tr. 21-22).

(g) The Stores Publishing Company prints a magazine called *Woman's Day*. (Tr. 22).

(h) The grocery purchasing department of the A & P Group is at company headquarters in New York, where the purchase of all supplies and food products is controlled. (Tr. 22-23).

(i) The food products manufactured by the A & P Group and acquired by it are shipped to A & P warehouses, through which they are distributed to A & P retail stores. (Tr. 23).

Food products are purchased in various states and foreign countries and shipped in interstate and foreign commerce to A & P warehouses, which distribute same to A & P retail stores for sale to consumers, and such stores are the conduit through which such products move in interstate commerce from producers to consumers. (Tr. 23).

The number, description and location of the A & P stores, amounts of sales of each are given in Paragraphs 16, 17 and 18. (Tr. 23-27).

The products for the retail stores are requisitioned from the warehouses and billed to the stores at retail prices, except fresh meat, which is invoiced wholesale. The store personnel is required to sell same at markups specified by the warehouses. Inventories of store stocks are made at frequent intervals, the results are checked against cash receipts, and the final result is called a stock result. While there are stock losses in all retail stores, there have been stock gains in A & P stores of millions of dollars annually. (Tr. 27-28).

All the business of the A & P Group and all officers, agents and employes thereof and their subsidiaries are entirely dominated by the headquarters defendants. (Tr. 28).

Defendants by virtue of the horizontal and vertical integration of their functions and business and the centralization and control thereof as aforesaid have and exercise the power to dominate and control production, prices and distribution of a substantial part of the food products in the United States. (Tr. 29).

Combination and Conspiracy to Restrain.

22. Simply charges that the defendants "have wilfully and unlawfully formed and carried out in part in the Northern District of Texas a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in food products produced, distributed and sold throughout the United States." (Tr. 29).

23. That the said combination and conspiracy has consisted in a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

a. That they select local areas wherein they use their dominant advantage to injure and destroy competition

of independent grocers, meat dealers and small local chains by selling at retail lower than elsewhere and by combining with other national food chains in such areas to maintain retail prices (Tr. 29-30).

b. Defendants systematically prevent competition in selected trade areas throughout the United States by (1) combining with independent grocers and local and national food chains therein to fix the retail prices and terms, and (2) by combining with manufacturers to maintain resale retail prices in such areas (Tr. 30).

c. They obtain for themselves buying preference over competitors by controlling conditions under which suppliers of food products shall sell to them and to their competitors.

Here follow eighteen subdivisions of c., alleging various actions of defendants, without any allegation showing that any of said acts were done in interstate commerce or had any effect upon interstate commerce. The only allegation that purports to refer to commerce other than intrastate commerce is in (10) alleging that defendants register for export from the largest coffee producing country the entire balance of the coffee quota available for export in a year, six months before the termination of the year, and this is in reference to foreign commerce (Tr. 31-32).

d. They foster false comparisons of their prices with prices of competitors and false reports to conceal their activities and perpetuate their dominance of the distribution of food products. Here follows (1) to (4) showing that the false comparisons of their prices were prices at retail (Tr. 34-35).

24. That defendants by agreement and concert of action have done the things hereinbefore alleged they conspired to do (Tr. 35).

Effects of Conspiracy.

25. The effect, as intended, has been to directly substantially and unreasonably restrain a large part of the trade and commerce in food products among most of the states, to injure and destroy food manufacturers, processors, canners, wholesalers and thousands of independent retail food dealers, to depress prices paid to growers for fruits, vegetables, to vest in defendants control of the distribution of food products in a preponderance of the large trade areas in the United States, and to make it impossible for thousands of non-integrated independents and small chains to enter into or remain in competition with the defendants (Tr. 36).

Jurisdiction.

26. That the conspiracy was entered into and carried out in part in the Northern District of Texas, where defendants Tea Company of Arizona and Atlantic Commission Company have offices and transact business. Within three years next preceding, defendants have performed within the Northern District of Texas many of the acts set forth in paragraph 23, particularly, they have advertised food products, particularly meat, below cost and below the price charged in other locations, for the purpose and with the intent of destroying competition of independent concerns, meat dealers and local chain stores (Tr. 36-37).

COUNT TWO.

Count Two contains the same allegations as Count One, except that the conspiracy referred to in Count Two is a conspiracy to monopolize a substantial part of the interstate trade and commerce in food products (Tr. 37-46).

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the allegations in the indictment that the conspiracy was in part formed in Dallas and entered into in Dallas were allegations of fact, and not mere conclusions, showing jurisdiction in the trial court.

2. The Circuit Court of Appeals erred in holding that allegations that the conspiracy was carried out in part in Dallas by performance of many of the acts in paragraph 23, particularly the advertising of food products, particularly meat, below cost and below prices charged in other locations for the purpose and with the intent of injuring competition of independent concerns, meat dealers and local chain stores sufficiently charged performance of acts in furtherance of the conspiracy within the jurisdiction of the trial court so as to give venue to that court.

3. The Circuit Court of Appeals erred in holding that the indictment, which did not allege any fact showing that the conspiracy charged affected prices and competition in the interstate market, was sufficient against demurrer.

4. The Circuit Court of Appeals erred in holding that the indictment alleged facts, rather than conclusions, sufficient to inform the defendants of the charges against them so that they might prepare their defense or plead former jeopardy.

5. The Circuit Court of Appeals erred in holding that the indictment charging a conspiracy between members of the A & P Group to fix prices at retail of that group's own products, and a conspiracy between members of that group and independent grocers, and a conspiracy between members of that group and manufacturers, and a conspiracy

between members of that group and other national food chains, and a conspiracy between members of that group and suppliers for other purposes, was not duplicitous.

6. The Circuit Court of Appeals erred in reversing and remanding the decision of the trial court, and in holding that the trial court was in error in sustaining the demurrer of petitioners to the indictment.

Argument.

Point A.

The indictment contains no allegation of fact showing jurisdiction.

The only allegations in the indictment purporting to show jurisdiction are the allegation that the combination and conspiracy has been entered into and carried out in part in the Northern District of Texas and the allegation that defendants have performed in said district many of the acts in paragraph 23, particularly the advertising of meat below cost and below prices charged elsewhere for the purpose of destroying competition of independent concerns, meat dealers and local chain stores.

A consideration of these allegations in connection with the alleged actions of the defendants in paragraph 23 shows that Circuit Justice Waller was correct in his dissenting opinion when he said that the allegation that the conspiracy had been entered into and carried out in part in the Northern District is a legal conclusion and, as it is not predicated upon allegations of fact, is without effect, and that the allegation that the defendants have performed within the Northern District many of the acts in paragraph 23 is wholly insufficient because paragraph 23 alleges twenty-five or thirty acts, some of which, standing alone, have no relation whatsoever to interstate commerce, and if this purports

to be an allegation of fact, it is so vague, indefinite and uncertain that a defendant would not know how to prepare his defense or plead former jeopardy or acquittal under such an indictment and should not be put to the burden of preparing to disprove, on the question of venue, all of them, when it is alleged that only some of them occurred in Dallas (Tr. 125).

As said in Justice Hutcheson's majority opinion, the indictment contains many allegations which "are irrelevant and unnecessary to the charging of the offense" (Tr. 114).

Many of the acts in paragraph 23 were wholly in intrastate commerce, such as selling at retail in local areas lower than elsewhere, combining with food chains to fix retail prices in such areas for the purpose of injuring independent grocers engaged in intrastate commerce, combining with independent grocers to fix retail prices and with manufacturers to fix resale retail prices in such areas. As none of the acts in paragraph 23 are alleged to be in interstate commerce, the court must assume that all are in intrastate commerce. *Joplin Mercantile Co.* v. *U. S.*, 236 U. S. 531, at 535.

There is no allegation of fact in the indictment showing that these actions, wholly in intrastate commerce, affected prices or competition in the interstate market so as to bring them within the condemnation of the Sherman Act as construed by Chief Justice Stone in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

The allegation that many of the acts in paragraph 23 were performed in said district should be disregarded, because it is a conclusion and because it cannot be ascertained from the indictment which acts were done in said district, or whether they were relevant to the charge, and it does not appear that any of such acts affected competition or prices in the interstate market. When defendants are required

to answer a charge of an unlawful conspiracy on a claim that it was in part entered into and carried out in the place where the suit is filed, their accusers should be required to allege facts so that the court may determine whether the conspiracy was in fact entered into and carried out in that district.

When the paragraph purporting to allege jurisdiction particularized the act done in the Dallas District, the allegation was the advertisement of meat below cost and below prices charged for same in A. & P. retail stores in other locations, for the purpose of destroying competition of concerns engaged in intrastate commerce. A careful search of the allegations in the charging portion of the indictment and paragraph 23 shows no allegation that defendants advertised food products below cost. The advertising of prices at retail, for the purpose of injuring competition in intrastate commerce would not give jurisdiction to the court (Tr. 8, par. 4; tr. 7, par. 2 (1)).

The allegation, "by performance of many of the acts in paragraph 23" in the Dallas District, may have referred to many of the acts said by Justice Hutcheson to be irrelevant to the charging of the offense. Such acts could in no event give jurisdiction. Such allegation may have referred to some of the many acts done in intrastate commerce, or to some of the acts of the single trader, the A. & P. Group, without combination with others. The commission of such acts would not give jurisdiction in the absence of an allegation of fact that such acts affected competition, prices, etc., in the interstate market.

This Court, in *Southern Ry. Co.* v. *King*, 217 U. S. 524, held that an allegation that a state statute requiring a railroad to keep checking the speed of its trains while approaching crossings was a direct burden upon and impedes interstate traffic and impairs the use of defendant's facilities,

that it was impossible to observe the statute in carrying mails in interstate commerce, was a conclusion, and sustained the demurrer to such allegations.

Later, *Pierce Oil Co.* v. *City of Hope,* 248 U. S. 498, by Justice Holmes, held that an allegation that an ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law on a point which the court must decide, is not admitted by the demurrer, and if it be taken to allege that facts lead to that conclusion, it stands no better, that an averment in this general form is not enough when attacked by a demurrer.

Missouri Pacific Ry. Co. v. *Norwood,* 282 U. S. 247, held that conclusions of the pleader as to matters of fact are not admitted by motion to dismiss.

Witherell & Dobbins v. *United Shoe Machinery Co.* (C. C. A. 1st), 267 Fed. 950, held that each of the allegations: that a party had been and is engaged in an attempt to unlawfully monopolize and has unlawfully monopolized the manufacture and distribution in interstate commerce to the extent of 95% of the shoe machinery, that an unlawful monopoly was being maintained, that certain leases unreasonably restrained interstate trade and commerce, that the agreements were made in the course of interstate commerce, was a conclusion and not binding.

In *Lipson* v. *Socony-Vacuum Corp.,* 75 F. (2d) 213, plaintiff sought damages under the Clayton Act prohibiting discrimination in prices, etc. The court held that each of the allegations: that the effect of the discrimination in prices was to substantially lessen competition between defendant and other refiners, that the effect of the agreement not to deal in commodities of defendant's competitors would have been to substantially lessen competition between defendant and other refiners, and that the effect of another act was to substantially lessen competition between defendant and other refiners, was a mere conclusion.

As said by Associate Justice Waller in the dissenting opinion, the indictment nowhere alleges that the acts relied upon to show jurisdiction were such transactions or practices or that they were done with sufficient substantiality to have any effect in the suppression of competition or the monopolization of the interstate market, or in the control of its prices, or in the discrimination between its would-be purchasers. In the absence of any allegation of fact showing such effect, a court should not imply that such was the effect, and conclusions in the indictment should not be substituted for allegations of fact. *Apex Hosiery Co.* v. *Leader, supra.*

POINT B.

No allegation of fact showing violation of the Sherman Act.

All conspiracies that affect interstate commerce are not condemned by the Sherman Act. Among these is a conspiracy which stops the transportation of goods in interstate commerce; another stops the manufacturing of goods which are to be transported in interstate commerce, but such interference with interstate commerce, as held in the *Apex* case, is not within the condemnation of the Sherman Act unless such interference affects competition and prices in the interstate market.

Again, there might be a conspiracy in interstate commerce itself, but the conspiracy would not be in violation of the Sherman Act unless it had the effect on the interstate market described in the *Apex* case.

A combination and conspiracy to fix retail prices in intrastate commerce might affect interstate commerce, but under the *Apex* case and other decisions of this honorable court, such combination to fix retail prices would not come within the condemnation of the Sherman Act unless such

combination had the effect on interstate competition described in the *Apex* case.

We recognize that a conspiracy between competitors to fix prices in the interstate market is *per se* an unreasonable restraint of interstate commerce. The indictment does not allege any such conspiracy. The only price-fixing charges were that the Atlantic & Pacific Tea Company and its subsidiaries, through its officials directing the business of the A. & P. Group, conspired among themselves to fix the retail prices of that group's own products, that the A. & P. Group conspired with others to fix retail prices, and with others to fix resale prices at retail (Tr. 31-34), but there is no allegation that any of these were in the interstate market or that any of them affected prices in interstate commerce.

So far as the allegations in the indictment are concerned, the articles subject to such price-fixing arrangements may have been produced or manufactured, delivered to A. & P. retail stores, and sold in the same state, and yet, under the decisions of this honorable court, even if the articles had moved in interstate commerce and had come to rest in a state, the fixing of wholesale or retail prices for sales within that state, by agreement or conspiracy between competitors would not be within the condemnation of the Sherman Act unless such fixing of prices had the effect on competition and prices in the interstate market described in the *Apex* case.

There is no allegation of fact in the indictment that any conspiracy or act had such effect. The allegations as to the effect of the conspiracy are that the defendants have wilfully and unlawfully formed and carried out a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate commerce in food products, and that the effect of the conspiracy, as intended, has been to directly, substantially and unreasonably re-

strain a large part of the trade and commerce in food and food products among most of the states; to injure and destroy food manufacturers, processors, canners, wholesalers and thousands of independent retail food dealers; to depress prices paid to growers for fresh fruits, vegetables and other farm products; to vest in defendants control of the distribution of food products in a preponderance of the large trade areas of the United States, and to make it impossible for thousands of non-integrated independents and small chains to enter into or remain in competition with defendants (Tr. 36).

The allegation that the conspiracy unreasonably restrained a part of the trade and commerce in food products is a mere conclusion and not binding on the defendants, as is the allegation that the effect of it was to injure food manufacturers and independent retail food dealers. The injury to these named persons, defined by the indictment as those engaged in intrastate commerce, would not bring the conspiracy within the condemnation of the Sherman Act. Depressing prices paid to growers of fresh fruits, vegetables and other farm crops would not be in violation of the Sherman Act, because such prices were paid in intrastate commerce. The allegation that the effect of the conspiracy was to vest in defendants control of the distribution of food products in large trade areas in the United States is a mere conclusion and not binding on the defendants. Likewise, the allegation that the effect was to make it impossible for thousands of non-integrated independents and small chains to enter into intrastate competition with the defendants is a conclusion, and, furthermore, the prevention of such competition would not be within the Act.

Justice Hutcheson in the majority opinion held that acts done to give effect to the conspiracy may be within themselves wholly innocent, but if they were relied upon to effect the conspiracy which the Sherman Act forbids, they fall

within the condemnation of the statute. Under the decisions of this Court, innocent acts or lawful acts may come within the condemnation of the Sherman Act only when they restrain competition or affect prices in the interstate market. *Apex Hosiery Co.* v. *Leader, supra.*

As there is no allegation that the various acts alleged in the indictment were transactions in interstate commerce, they are presumed to be intrastate. *Joplin Mercantile Co.* v. *U. S., supra.*

As there is no allegation in the indictment that any of these actions had the effect on competition, prices, etc., in the interstate market described in the *Apex* case, the indictment fails to charge a violation of the Sherman Act.

Point C.

Allegations of indictment too vague and indefinite.

The attempt to charge a criminal offense in this indictment is wholly lacking in clarity and particulars necessary to inform the defendants of the charge against them so that they may prepare their defense or plead former jeopardy.

The Fifth Amendment confers upon the accused the right to be so informed that he may prepare his defense. The Sixth Amendment requires that he shall enjoy the right to be informed of the "nature and cause of the accusation." The Supreme Court's interpretation of these provisions appears in the case of *U. S.* v. *Cruikshank*, 92 U. S. 542, in which it was held that the objects of the indictment are (1) to furnish such a description of the charge as will enable the accused to make his defense and avail of his conviction or acquittal; and (2) to inform the court of facts so that it may decide whether they are sufficient to support a conviction, and that to attain these objects—

> "* * * facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and

these must be set forth in the indictment with reasonable particularity of the time, place and circumstances."

When one is indicted, the presumption is that he is innocent, that he is ignorant of the facts upon which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested in the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading. *Fontana* v. *U. S.* (C. C. A., 8th), 262 F. 283, at 286.

This protection of the accused must be afforded in anti-trust indictments.

An indictment following the general language of the Sherman Act is wholly insufficient. The counts of the indictment under consideration must be tested not by such general allegations as "the defendants have wilfully and unlawfully formed and carried out a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce," (Tr. 29) and the effect of the conspiracy was "to directly, substantially and unreasonably restrain a large part of the trade and commerce in food and food products among most of the states" (Tr. 36), but by particular facts showing what was actually done by the accused, and if the particular facts charged do not as a matter of law constitute combinations and conspiracies in restraint of interstate commerce or a monopoly of a part of that commerce, no amount of allegations that the accused engaged in a combination or made contracts in restraint of such trade or commerce or monopolized or attempted to monopolize the same will avail to sustain the indictment. *In Re Green*, 52 F. 104, 111.

We shall not undertake to analyze the indictment in detail, but a consideration of it discloses that it is devoid of factual allegations informing the defendants of the charge against them.

It charges, for example, that defendants "select local areas," but no areas are named; that they sell at retail in those areas "sufficiently lower than elsewhere," but the areas and products are not described nor time given; that defendants combine with other national food chains to fix, maintain and follow the retail prices established by defendants, but the other parties are not named or identified, the areas are not defined, and there is no information as to the food items involved; that defendants systematically prevent competition in selected areas by combining with local food chains to fix retail prices and with manufacturers to fix resale retail policies, that they coerce suppliers to sell to other wholesalers and retailers on terms dictated by them, and to give defendants preferential discounts, but the parties to such combinations and coercions are not named; that they conspired with independents to fix retail prices in selected areas, but no areas are defined, none of the independents are named or described, although it is shown that there are more than half a million of them and the period of time covered is more than twenty years.

According to the indictment the A & P operated 15,731 stores in 1940, 14,748 in 1936 (Tr. 23), and as of May 1, 1942, they operated in 3,436 cities 6,412 stores in thirty-seven different states (Tr. 24-26). It is humanly impossible for these defendants to know or even suspect to which one or more of those areas the indictment refers.

These allegations of the indictment are sufficient to illustrate the defects therein. The Government must know the other chains, manufacturers, independents, suppliers with whom defendants are said to have combined and the local and selected areas referred to. It must be prepared to prove these acts. Defendants cannot be prepared when they are presumd to be innocent and have no information as to them. As held in *Asgill* v. *U. S.* (C. C. A., 4th) 60 F.

(2) 780, 784, a conspiracy is so easily charged and the charge so difficult to meet unless defendants are fully informed of the facts relied upon to sustain the indictment. The right to be so informed is fundamental, and it is not in harmony with the philosophy and spirit of a free people living under a written constitution that courts will accept generalities for facts.

The Government in at least five cases has attempted to appeal directly to this honorable court from decisions of lower courts holding indictments with such general, vague and conclusory allegations insufficient, and in each of those cases this court has denied the right of the Government to have this court determine the question of such deficiency of the indictment by a direct appeal under a statute that gives the right of such appeal to the Supreme Court only where the trial court's opinion has construed, or passed upon the validity of, a Federal statute.

We respectfully refer the court to the excellent opinion of Judge Hopkins, of the Federal District Court of Kansas, on August 20, 1943, in the cases of *U. S.* v. *Safeway Stores* and *U. S.* v. *Kroeger Grocery & Baking Co.*, not yet reported, in which demurrers were sustained to indictments containing the exact language used in the allegations involved in this case.

We respectfully refer the court to the excellent opinions of the trial courts in the five cases in which appeals were dismissed in this court because the Government took direct appeals from the trial courts. These cases are: *U. S.* v. *Colgate* (Va.), 253 F. 522, at 528, 250 U. S. 300; *U. S.* v. *Borden* (Ill.), 28 F. Supp. 177, 308 U. S. 188; *U. S.* v. *Wayne Pump Co.* (Ill.), 44 F. Supp. 949, 317 U. S. 200; *U. S.* v. *Swift* (Col.), 46 F. Supp. 848, 317 U. S. (4)i, 87 L. Ed. 647; *U. S.* v. *French Bauer* (Ohio), 48 F. Supp. 260, Memo. Dec. 514, 318 U. S., 87 L. Ed. 464.

In each of these cases the trial court sustained demurrers to indictments containing allegations such as are involved in this indictment.

POINT D.

The indictment is duplicitous.

Justice Hutcheson in the majority opinion of the Circuit Court of Appeals, in holding that the indictment is not subject to the objection of duplicity, called attention to the case of *George W. Burk* v. *U. S.*, 134 F. (2) 879, in which it was held that where a common thread runs through all of the actions and a common purpose animates all of the conspirators, the fact that many persons come into and many acts are embraced in the conspiracy does not make the charge duplicitous by charging many instead of one conspiracy. Justice Hutcheson then said:

> "* * * Here the common thread is the dominance of what is called the headquarters defendants in the A & P Group. As Green, in that case, was the bridge, which carried the conspiracy over from the first into the second administration and, from the standpoint of the criminal conspiracies, made the two administrations one, so here, upon the allegations of the indictment, the interrelation and ramifying activities of all the associated and affiliated companies and their dominance and control by the headquarters defendants make the conspiracy charged not several but one."

In the *Burk* case there was a charge of conspiracy of law enforcement officers to encourage the making of intoxicating liquors on the payoff system. Green, the deputy sheriff under the administrations of Burns and of his successor, Burk, by his testimony showed that both sheriffs joined the general conspiracy.

Justice Hutcheson's opinion creates the impression that the conspiracy alleged by the indictment was solely a

conspiracy between members of the A & P Group and affiliated companies. This is not true. The indictment alleges that the officers of the A & P Group conspired among themselves to do various things, such as fixing prices of their own products (Tr. 30), which petitioners say is not a conspiracy at all, because it is the act of a single trader made up of non-competing units. *U. S.* v. *General Electric Co.*, 272 U. S. 476; *U. S.* v. *Winslow*, 227 U. S. 217, 218; *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 45; *Alexander Milburn Co.* v. *Union C & C Co.* (C. C. A., 4th), 15 F. (2) 678 at 680.

In addition to this alleged conspiracy, the indictment alleges another and entirely different conspiracy between the A & P Group and a part or all of the half million independent grocers (Tr. 30); another separate, different and distinct conspiracy between this group and a part or all of the thousands of manufacturers (Tr. 30); then another entirely different conspiracy between the A & P Group and wholesalers (Tr. 31). Each of these different alleged conspiracies had a different purpose, and it is because of the joinder of these separate offenses in one count in the indictment that the petitioners contend that the indictment is duplicitous.

We do not find that this honorable court has directly passed upon this question of duplicity. We submit that the following cases support our position here: *U. S.* v. *Winslow*, 195 F. 578, 580, *Rice* v. *Standard Oil Co.*, 134 F. 464, *U. S.* v. *Borden*, 28 F. Supp. 177.

We respectfully submit, for the reasons heretofore assigned, that writ of certiorari should be granted by this honorable court, so that it may review the decisions of the Circuit Court of Appeals and finally reverse it.

THE NEW YORK GREAT ATLANTIC &
PACIFIC TEA COMPANY, INC.,

THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF AMERICA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEW JERSEY,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ARIZONA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEVADA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF VERMONT, INC.,
THE GREAT ATLANTIC & PACIFIC TEA CORPORATION, DELAWARE,
THE QUAKER MAID COMPANY, INC.,
THE AMERICAN COFFEE CORPORATION,
WHITE HOUSE MILK COMPANY, INC.,
NAKAT PACKING CORPORATION,
ATLANTIC COMMISSION COMPANY, INC.,
GEORGE L. HARTFORD,
JOHN A. HARTFORD,
R. W. BURGER,
ROBERT B. SMITH,
DAVID T. BOFINGER,
A. G. ERNST,
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